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NO. 80-1273

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1980

JOE H. MCILROY

& JOHN ROLLINS

VS.

THE STATE OF TEXAS

On Writ of Certiorari to the the Court of Criminal Appeals of the State of Texas

PETITION FOR WRIT OF CERTIORARI

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(a) QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE: Whether the forfeiture of the bail bond herein for failure of Defendant, John Rollins, (One of the petitioners herein) herein to appear for trial, coming only five days after indictment, deprived petitioners of their property without due process of law in violation of Amendment XIV of the Constitution of the United States in that defendant's court-appointed attorney had inadequate time in which to prepare for trial?

QUESTION TWO: Whether petitioners were deprived of their property without due process of law in violation of the 14th Amendment to the United States Constitution in that Defendant was not allowed ten days in which to file written defensive pleadings as required by Texas Law?

(b) LIST OF PARTIES:

John Rollins, Petitioner

Joe H. McIlroy, Petitioner

The State of Texas, Respondent

Bobby Wynne, (Was a co-appellant in the Texas Court of Criminal Appeals, but abandoned his appeal, and is not a party to this petition.)

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of Criminal Appeals purporting to deny "Leave to File Appellant's Motion for Rehearing" 6

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TABLE OF AUTHORITIES

CONSTITUTIONS & STATUTES:

United States Code Service, Lawyer's Edition, Amendments, 5-End, Constitution U.S.C.S. p.444 9,18

Texas Code of Criminal Procedure, Article 26.04, Acts 1965, Chapter 722, p.425, Venon's Texas Statutes Annotated, Code of Criminal Procedure, Vol 2, p.266 10,20

Texas Code of Criminal Procedure, Art. 27.11, Acts 1965, Chapt. 722, p.430, Vernon's Texas Statutes Annotated, CCP., Vol2, p.328 10,23

CASES:

Johnson v. Zerbst, 304 U.S.456 82 L.Ed.1461 23,24

Schact v. U.S., 398 U.S. 58 8

State, Ex rel. Vance, v. Routt 571, S.W. 2d 903, 906 20

(d) The decision in this case below has not been reported in any official or unofficial reports to the date of this writing.

(e) GROUNDS OF JURISDICTION OF THIS COURT

(i) The judgment of the Court of Criminal Appeals of the State of Texas herein was made and entered on July 16, 1980.

(ii)The Court of Criminal Appeals of Texas entered an order on September 17, 1980, in which it "denied Leave to File" the appellant's Motion for Rehearing. (Petitioners contend that they had an absolute right to file their Motion for Rehearing under the applicable Texas Practice Rules.) (Attachment "B", Appendix)

PETITIONERS' PLEA FOR WAIVER OF TIMELY FILING OF PETITION

The within petition is filed after the time allowed by the current rules of This Court because of a misunderstanding of the rules by petitioners' counsel.

Petitioners urge the Court to waive the requirements of Rule 20.1 that the petition herein be filed within sixty days after the entry of judgment for the following reasons:

(a) Neither petitioners nor their attorney have heretofore prosecuted any kind of action before this Honorable Court. In order to prosecute a petition for writ of certiorari herein, it was first necessary that petitioners' attorney obtain admission to the Bar of the Supreme Court, a process which required several weeks in itself.

(b) Because of his previous total inexperience before this Court, petitioners' attorney made a careful study of the Rules of this Court to determine what acts and procedures were necessary in order to perfect the petition herein. The Attorney carefully

determined that the rules required that a petition for certiorari be filed within ninety days after judgment pursuant to Rule 22(1). Attorney further checked the 1980 Pocket Part of his Rule Volume to determine if said rule was still current, and found no changes therein. He therefore concluded that he had until December 16, 1980 to file his petition.

(c) On December 9, 1980 petitioners' attorney called the office of the Clerk of this Court concerning the proper form for the petition. At that time he was advised that a general revision of the Rules had become effective June 30, 1980. He then referred to a supplementary pamphlet to the U.S. Code Service, dated September, 1980, and found the latest rules. While studying same, primarily to determine the proper form for the petition, he discovered for the first time new Rule 20.1,

By said new rule the allowable time for filing had been shortened from 90 to 60 days.

(d) At the time he first became aware of the aforesaid new requirement, attorney had already drafted and typed his petition for certiorari so that the same could easily have been filed within the previously required 90 day period.

(e) Immediately upon becoming aware of the new rule attorney drafted and mailed a motion seeking an extension of time. Said motion was received by the Clerk on Dec. 15, 1980, but was returned to attorney as being out-of-time. Attorney was later advised by a deputy Clerk that he should incorporate his reasons for late filing herein.

Under authority of Schact v. U.S., 398 U.S.58 petitioners respectfully pray the Court to waive the requirements of Rule 20.1 herein.

(iv) Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

(f) Constitutional and Statutory Provisions Involved:

(1) Amendment XIV of the United States Constitution, Section 1:

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code Service, Lawyers' Edition, Amendments 5-End, Constitution

U.S.C.S., p.444

(2) Article 26.04 (b) of the Texas Code of Criminal Procedure:

"(b) The appointed counsel is entitled to ten days to prepare for trial, but may waive the time by written notice, signed by counsel and the accused."

Texas Code of Criminal Procedure, Acts 1965, Chapter 722, p.425, Vernon's Texas Statutes Annotated, Code of Criminal Procedure, Vol 2, p.266

(3) Article 27.11 of the Texas Code of Criminal Procedure:

"Article 27.11 Ten days allowed for filing pleadings

In all cases the defendant shall be allowed ten entire days, exclusive of all fractions of a day after his arrest, and during the term of court, to file written pleadings."

Texas Code of Criminal Procedure, Acts

1965, Chapter 722, p. 430, Vernon's Texas Statutes Annotated, Code of Criminal Procedure, Vol. 2, p. 328.

(g) Statement of the Case:

This is a case involving forfeiture of a bail bond. Petitioner, Joe H. McIlroy, was a co-surety on an appearance bond written for petitioner, John Rollins, as defendant and principal, in the principal sum of $20,000.00, and dated January 2, 1979. An indictment bearing the docket No. 18937 was returned against defendant, Rollins, on January 25, 1979 in the 181st District Court of Potter County, Texas, and immediately thereafter transferred to the 251st District Court of Potter County, Texas.

A judgment nisi was signed by Judge Naomi Harney of the 251st District Court of Potter County declaring a forfeiture of $20,000.00 against John Rollins, the

principal on the bond, and the sum of $19,000.00 against the sureties on the bond. No date of rendition was shown on the said judgment, but it recited that: "On the 30th day of January, 1979 this cause was called for trial---but the defendant failed to appear.--" The said judgment bears a clerk's filing stamp dated January 30, 1979. In its final paragraph the said judgment nisi rendered judgment against John Rollins as principal and against Joe H. McIlroy and Bobby Wynne as sureties in the principal sum of $20,000.00.

Scire facias was thereafter served on Joe H. McIlroy and Bobby Wynne as sureties and John Rollins as principal. The case came on the be heard on June 4, 1979 in the 251st District Court. At the said hearing the State of Texas introduced its "Exhibit 1" which consisted of the above-described judgment nisi and the

above-described citations (scire facias), and the above-described bond. The said documents were admitted without objection, and the State immediately thereafter rested its case.

The suretys' evidence showed that, at the time of the final trial on June 4, 1979, John Rollins was incarcerated in the Potter County Jail awaiting trial on another charge, and that the charge on which the instant bond forfeiture was based had been dismissed on motion of the State

The suretys' evidence further showed that surety Bobby Wynne had incurred expenses in an attempt to locate John Rollins. At the conclusion of all the evidence the court rendered judgment against John Rollins for $20,000.00, and against the suretys for $19,000.00, remitting the sum of $1000.00 in favor of the sureties in consideration of the

showing of work and expense by surety, Bobby Wynne.

The court's docket sheet showed that the only counsel that ever appeared of record for defendant, Rollins, was Doyce Mallett, who was appointed by the court to represent defendant on March 15, 1979.

(h) The first question herein was first raised by assignment of error in the Brief of Appellant, Joe H. McIlroy, (One of the petitioner's herein) to the Texas Court of Criminal Appeals, the same being raised by Point of Error No. Six therein, and being stated as follows:

> "The court erred in rendering judgment nisi on January 30, 1979 for the reason that the defendant could not have been legally forced to trial at said time because his court-appointed attorney (Tr.48) had not been given the required period of ten days in which to prepare for trial."

This contention by petitioner was overruled by the decision of the Texas Court of Criminal Appeals rendered July 16, 1980, (Paragraph beginning at the bottom of the third page of the said opinion and concluding on the 4th page of same.)

The second question herein was first raised by assignment of error in the Brief of Appellant, Joe H. McIlroy, to the Texas Court of Criminal Appeals, the same being raised by Point of Error No. Seven therein, and being stated as follows:

> " The court erred in rendering judgment nisi on January 30, 1979 for the reason that defendant could not legally have been forced to trial on that date in that he had not been given the required ten days in which to file defensive pleadings."

This question was decided adversely to petitioner by the opinion of the Texas Court of Criminal Appeals rendered on

July 16, 1980, by the last sentence of the first (full)paragraph beginning on p.4 of the said opinion, wherein the court said:

"we overrule this contention."

(i) A copy of the opinion of the Texas Court of Criminal Appeals rendered July 16, 1980 is hereto attached, marked Attachments A-1 through A-3.

(ii) N/A.

(iii) The opinion to which reference is made in Paragraph (i) above is, in effect, the judgment sought to be reviewed, in that same, on the last line of same (p.5) says:

"The judgment is affirmed."

A copy of the order by which the court purported to "deny leave to file" Appellant's Motion for Rehearing is hereto attached, marked Attachment "B".

(i) N/A.

(j)

ARGUMENT

All of the questions presented herein involve fundamental constitutional rights and principles. As far as appellants' counsel has been able to determine, the exact said questions have not been heretofore determined by this Court, but the judgment of the State Court herein was not in accord with applicable decisions and opinions of this Court, which are applicable by reasonable analogy to the situations herein. Petitioners were thereby deprived of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The authorities which petitioners

will cite herein all present cases which involved a direct deprivation of the parties' liberty without due process of law. While the within case involves a deprivation of property rather than liberty we believe the applicable constitutional principles are exactly analagous. That such principles are analagous and equally within the purview of the protections of the Constitution is strongly suggested by the "due process clause" of the Constitution itself, as follows:

> " ---nor shall any State deprive any person of life, liberty, or property without due process of law.---" U.S. Constitution, Amendment XIV 1.,U.S. Code Service, L.E. Amendments 5-End, Constitution, U.S. C.S. p.444

This wording shows clearly that "property" is accorded equal dignity with "liberty" in the requirement of due

process. Indeed it is difficult for the writer to imagine any way in which a party could be deprived of his property without incidentally being deprived of his liberty to some extent.

QUESTION ONE

This question involves the fundamental right of an indigent defendant to the effective assistance of counsel, and adequate time for such counsel properly to prepare such defense. Admittedly the within case involves a forfeiture of a bail bond rather than a direct deprivation of liberty. The courts of the State of Texas, however, have always regarded and treated bail bond forfeitures as an integral part of the criminal prosecution to which they are ancillary. As to this see:

> "(3) Prior decisions of this Court and the Supreme Court leave no doubt that a bond forfeiture proceeding is "criminal in nature", citing:

Glenn v. State, 155 Tex. Cr. R.498, 236 S.W.2d 809, et al., State, Ex rel. Vance v. Routt, 571 S.W.2d 903,906

Petitioners' basic contention in this regard is that due process of law required that the defendant's court-appointed attorney be given ten days in which to prepare for any trial of the pending indictment. He is clearly given this right under the Texas Code of Criminal Procedure, which provides:

"Article 26.04

(b) The appointed counsel is entitled to ten days to prepare for trial, but may (e.a.) waive the time by written notice signed by the counsel and the accused."

The question of what constitutes "due process" is ordinarily a very complex and nebulous question, but fortunately, in this case, the question is answered very definitively by the above-quoted code section. Where a state has

by its own law defined what is due process as herein, said definition is controlling. As to this, see:

> "--Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state.-"

There seems therefore no doubt that the defendant was not accorded due process herein. The Texas Court of Criminal Appeals has attempted to dismiss this point in the third par. of the third page of its opinion by suggesting that

> "The record does not show the nature of the proceeding which the principal did not attend".

This suggestion, however, is clearly erroneous in that the very judgment appealed from clearly shows on its face that the grounds of forfeiture was that the defendant did not appear when the case was called for "trial". (Copy of said judgment hereto atached, marked (Exhibit "C".)

The said court further suggests, that the failure to allow the appointed attorney ten days in which to prepare for trial as required may not have been erroneous because the defendant may not have had an attorney at that time.)Opinion, Attachment A-2, p.3, last three lines.) It would certainly seem, however, that this failure, if in fact it did occur, would be even more reason for holding that the indigent defendant was denied due process, the defendant's right to effective representation being the most fundamental of all elements of due process, as to this see:

> "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of the trial court.---This protecting duty imposes the serioud and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver of the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropri-

ate for that determination to appear upon the record." Johnson v. Zerbst, 304 U.S. 456,466, 82 L.E. 1461

It is apparent from the above that a waiver of fundamental constitutional rights to due process should not be presumed as the court did in this case.

SECOND QUESTION

The principles involved in the determination of this question are essentially the same as those involved in the first question. Again the defendant was not allowed ten days in which to file defensive pleadings as required by Article 27.11 of the Texas Code of Criminal Procedure , the said article being as follows:

> "In all cases the defendant shall be allowed ten entire days exclusive of all fractions of a day after his arrest, and during the term of the court, to file written pleadings."

The record herein reflects that the indictment herein was returned on January 25, 1979, only five days prior to the date on which the case was called for trial.

(See: Attachment "D", Appendix hereto) The record herein does now show a waiver of this right as required by Johnson v. Zerbst, 304 U.S. 456, 465, 82 L.E. 1461, 1467.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED:

Robert E. Barfield

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Amarillo, Texas 79101

CERTIFICATE OF SERVICE

I, Robert E. Barfield, Attorney for Petitioners, hereby certify that I have this date served upon the Defendant, State of Texas, a true copy of the above and foregoing petition, by mailing a copy of same to its Attorney of Record, Hon. Robert Huttash, State Prosecuting Attorney, at his office address: P.O. Box 12308, Austin, Texas 78711.

This _____day of _____, 1981.

_____
Attorney for Petitioners